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In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 76

KLOR'S, INC., *Petitioner,*

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, ZENITH RADIO AND DISTRIBUTING CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above entitled case on March 28, 1958.

CITATIONS TO OPINIONS BELOW.

The order of the trial court is unreported and appears at Tr. 133-134. The opinion of the United States Court of Appeals for the Ninth Circuit is as yet unreported and appears attached hereto as Appendix A. The opinion of the trial court appears at page 8 of said opinion.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 28, 1958 (R. 182, Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

1. Whether Section 4 of the Clayton Act affords the federal courts jurisdiction to protect single traders from forbidden conduct of the type condemned in the Sherman Act which is in or affects the free flow of commodities in interstate trade and commerce; or whether the federal courts are allowed to dismiss bona fide complaints under summary judgment procedure on the ground that the antitrust laws only protect the public at large and do not afford federal jurisdiction to the protection of a single trader.

STATUTES INVOLVED.

The statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 and Section 4 of the Clayton Act, 15 U.S.C. Section 15. These are printed and attached hereto as Appendix C. In addition, Rule 56, Summary Judgment, is printed and attached hereto in Appendix C.

STATEMENT OF THE CASE.

Petitioner's complaint was filed on February 23, 1956. (Tr. 3-15.) It originally contained charges of violations of the Robison-Patman Act as well as the Sherman Act. By pre-trial order the complaint as to violation of the Sherman Act was separated from charges of violations of the Robinson-Patman Act, and the proceedings thereafter below and on appeal were concerned only with the complaint as printed in the record. (Tr. 20, 19.) The complaint alleges that ten manufacturers of radio, television sets, gas stoves and refrigerators and other white goods, Radio Corporation of America, General Electric Company, Zenith Radio Corporation, Philco Corporation, Emerson Radio and Phonograph Corporation, Rheem Manufacturing Company, Whirlpool Seeger Corporation, Admiral Corporation, Olympic Radio and Television, Inc., and Tappan Stove Company, and their affiliated distributors, conspired to discriminate and to boycott plaintiff at the favor of the plaintiff's competitor, Broadway-Hale Stores (Complaint, Pr. 6, 7, 8, Tr. 9-12.) The complaint alleges that the petitioner is

the owner and operator of a large retail store located on Mission Street, San Francisco, California, engaged in the business of selling household appliances to the consumer. (Id., p. 5.) It is alleged that petitioner is capable of handling a large volume of all lines of household appliances. (Id.) The defendant Broadway-Hale Stores, Inc. operates a chain of stores in the western area of the United States and sells the same type of merchandise as that sold by plaintiff. It operates a store located next door to plaintiff's store on Mission Street.

The complaint alleges that the respondents are in or affect interstate trade and commerce (Id., Pr. 2.) Said allegations were not denied by respondents in summary judgment affidavits.

The complaint charges that Broadway-Hale has used its chain buying power to cause these interstate manufacturers to enter into a conspiracy with it with the purpose and object of discriminating against petitioner and to cause the refusal of these manufacturers to sell all or most of their goods, to petitioner. (Complaint, Pr. 6, 8, Tr. 8-11, 12.) The conspiracy, it is alleged, allows Broadway-Hale a monopolistic position in the retail selling of household appliances. (Complaint, Pr. 8, Tr. 11-12.)

The complaint, then, may be summarized as involving the following: (1) a conspiracy composed of ten interstate manufacturers, their distributors and Broadway-Hale to discriminate against the petitioner as to those products sold it in prices, advertising allowances, demonstration techniques, and other terms

and conditions connected with the sale and distribution of the products manufactured and sold by the respondents. (Complaint, Pr. 6, Tr. 9-11.)

(2) a conspiracy composed of the same parties to refuse to sell their products to petitioner, a group refusal to deal.

(3) an attempt by these parties to allow Broadway-Hale a monopolistic position in the sale of their products.

(4) an intent by Broadway-Hale to use its chain buying power to monopolize the sale of these parties' products and injure and harm the petitioner.

Before answers were filed, the respondents moved the trial court to dismiss petitioner's complaint and for summary judgment. (Tr. 22, 128, 130.) The motion for dismissal of the complaint was deferred and the judgment entered by the trial court was filed after the granting of the motion for summary judgment. (Tr. 16, 17, 133-137.)

As against the positive averments of petitioner's complaint alleging conspiracies to discriminate and boycott, the use of monopolistic chain buying power and the oppression of a trader, the respondents on summary judgment supported their motion by telephone books and lists of accounts to which merchandise was sold. They were directed solely to the proposition that the existence of a "public injury" was a jurisdictional requirement under Section 4 of the Clayton Act. They did not direct themselves to the jurisdictional requirements of "interstate commerce".

As against the positive averments of the use of chain buying power, monopolistic design and intention to injure and harm petitioner, respondent Broadway-Hale filed an affidavit showing that there was other merchandise available to the petitioner aside from the merchandise manufactured and sold by its alleged co-conspirators. (Tr. 25-26.) It supported its position by attaching pages from the telephone books. It did not deny any of the allegations of the petitioner's complaint, nor aver that it could have successfully operated without the products denied petitioner.

The affidavits of the managers of the respondent manufacturers and distributors were of a similar cast. These affidavits contained no statement controverting the allegations of conspiracy and monopolization. Rather they showed that the respondents did not sell their merchandise to petitioner (Admiral, Tr. 45-47; Zenith, Tr. 48-50; Whirlpool, Tr. 50-52; RCA, Tr. 52-54 (and see telephone book, Tr. 30); Emerson, Tr. 54-57; Philco, Tr. 58-62; Wedgewood Stoves, Tr. 62-66; General Electric, Tr. 66-116; Olympic, Tr. 116-117; O'Keefe & Merritt Company, Tr. 121-124).

The courts below were thus faced with affidavits showing the existence of a bona fide group refusal to sell, operating in the channels of interstate commerce. Petitioner, although admittedly operating a large retail store, "at least comparable to the stores operated by Hale in plaintiff's competitive area" (R. 11) was not able to obtain the following merchandise, as admitted by the respondents: Admiral radios, televisions, refrigerators and electric ranges; Zenith radio

and television sets; Whirlpool clothes washers and dryers; RCA radio and television sets; Emerson radio and television sets; Philco radio and television sets and refrigerators; Wedgewood stoves; General Electric electric ranges, clothes washers and dryers, General Electric Television sets and radios; Olympic radio and television sets; Tappan stoves; O'Keefe & Merritt products.

The real issue before the court below was whether the positive averments of the petitioner's complaint had been controverted by affidavits disclosing the existence of the lack of substantial controversy between the parties. Rule 56, Federal Rules of Civil Procedure. Yet, despite the refusal of the respondents to deny the positive allegations of petitioner's complaint, and the disclosure of a prima facie group refusal to deal in summary judgment affidavits the District Court concluded that it had no jurisdiction over the subject matter. (Tr. 133-134.) It said that the antitrust laws are concerned only with public wrongs and not with the victimization of a single trader. It did not search the complaint for violations of the antitrust laws; it did not determine whether or not the affidavits were sufficient to controvert the allegations of violations of the antitrust laws; it surmised the existence of a personal squabble and declined to exercise jurisdiction. Yet, it is admitted in the opinion of the Ninth Circuit that "We need not concern ourselves with the substantiality of the amount of commerce involved". (Opinion, p. 13.)

Between the filing of the judgment of the trial court on September 25, 1956 (Tr. 136) and the filing of the opinion by the Ninth Circuit on March 28, 1958, this Court had decided the case of *Radovich v. National Football League, et al.*, 352 U.S. 445, 77 S. Ct. 390.

The Ninth Circuit affirmed the judgment of the lower Court holding that the affidavits of the respondents had demonstrated that the Federal Court had no jurisdiction of the subject matter. It concluded the following: (1) The antitrust laws do not condemn the entry into conspiracies by otherwise competitive corporations affecting interstate commerce to the injury of a single trader, and do not condemn the plans of a chain buying corporation to harm and injure his competitor; (2) the antitrust laws were designed to protect only the public at large and the public is not entitled to the competition of all traders in a market free of predatory conduct otherwise condemned by the antitrust laws if applicable to an entire class; (3) the existence of a conspiracy in per se restraint of trade, a conspiracy to boycott, may be controverted on summary judgment by showing that the conspirators did not ruin all or a substantial amount of competition; (4) the doctrine of per se violation of the antitrust laws permits or allows the Courts to consider the economic effect of the conduct per se forbidden by the antitrust laws on the public at large; (5) in a summary judgment setting, the Court may construe plaintiff's complaint against him and restrict inferences from the complaint. Thus the Court failed

to view petitioner's complaint as involving a group refusal to deal or as involving predatory monopolistic conduct by the owner of a chain of retail stores doing business in interstate channels.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT BELOW IS IN TOTAL CONFLICT WITH THE DECISIONS OF THIS COURT WHICH HAVE (1) REJECTED THE PRINCIPLE THAT A VIOLATION OF A PUBLIC STATUTE IS SUBJECT TO A FURTHER JUDICIAL TEST THAT THE VIOLATION MUST INJURE THE PUBLIC AT LARGE AND (2) AFFIRMATIVELY HELD THAT ANTITRUST LAWS PROTECT THE LIBERTY OF A TRADER TO ENGAGE IN BUSINESS UNDER SECTION 4 OF THE CLAYTON ACT.

A. RADOVICH v. NATIONAL FOOTBALL LEAGUE, ET AL., HELD THAT THE ANTITRUST LAWS "PROTECT THE VICTIMS OF FORBIDDEN CONDUCT AS WELL AS THE PUBLIC".

1. Federal jurisdiction under the antitrust laws is supported by uncontroverted allegations showing that (a) the complaint is not frivolous, (b) the defendants have engaged in predatory commercial behavior either per se in restraint of trade or in unreasonable restraint of trade, (c) the parties are in or the conduct affects any part of a substantial amount of interstate trade or commerce.

Section 4 of the Clayton Act, Appendix C herein, states that "*any* person who shall be *injured* in *his* business or property by reason of *anything* forbidden in the antitrust laws may sue therefor in any district court. . . ."

Petitioner respectfully contends that its complaint raised conduct forbidden by the antitrust laws to its injury. The complaint may be summarized as alleging the following forbidden conduct: (1) a conspiracy be-

tween ten huge interstate manufacturing firms and their distributors to refuse to sell their products to petitioner at the instance or favor of a large chain buyer; (2) a conspiracy between ten huge interstate manufacturing firms and their distributors to agree to discriminate against petitioner at the favor of a large chain buyer; (3) predatory conduct on the part of a large monopolistic buyer who had the purpose and intent to injure the petitioner in its business. The affidavits in summary judgment did not deny these allegations, but, in fact, admitted the existence of a group refusal to deal. The affidavits tended to show only that the conspirators sold their product to other competitors of the large chain buyer, as to which the size and volume of trade is unknown and that the public could obtain the products which petitioner was not privileged to sell to it. They were directed at showing that the public was not injured. They did not show any relevant economic data. They did not show the type or classification of these various other retailers. They did not show the relative volume of business of Broadway-Hale compared to the petitioner or the other accounts. They did not show that any retailer could successfully operate without the products denied to petitioner.

The courts below, however, held that these affidavits were sufficient to prevent petitioner from obtaining a trial by jury under Section 4 of the Clayton Act and the federal Constitution. It accomplished this result by declaring (a) that Section 4 of the Clayton Act applies only to conduct which the court can visualize

as involving a "public injury" and (b) that the court on summary judgment motions can construe the allegations of petitioner's complaint against it and refuse to accept bona fide allegations, not denied, that competitors have entered into conspiracies of the type condemned by the antitrust laws. Thus the court below did not affirmatively concede that petitioner had alleged a conspiracy between competitors involving an agreement not to sell. In the thirty-two page opinion, the question of "conspiracy" was discussed at pages 23-24. The court therein viewed the complaint as alleging only that the chain buying competitor, Broadway-Hale conditioned its purchases with each of the manufacturing distributing respondents. It apparently viewed the complaint as involving ten vertical arrangements between Broadway-Hale and its respondent suppliers and not involving a horizontal conspiracy between the respondents. (Cf. *United States v. Interstate Circuit, Inc.*, 1939, 306 U.S. 208, 59 S.Ct. 467.)

The appellate court has said that the federal courts under the antitrust laws lack jurisdiction to afford protection to single traders because they are involved only with matters affecting a "public injury". The petitioner contends that "public injury" is not a jurisdictional requirement under Section 4 of the Clayton Act, and that this Court has clearly and expressly so ruled. That the antitrust laws afford petitioner protection from restraints of trade practiced by interstate corporations in an appreciable market which is part of a substantial amount of interstate

commerce has been authoritatively set forth in the cases of *Radovich v. National Football League,* 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed. 2d 456, and *Binderup v. Pathé Exchange,* 1923, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308.

The issue of "public injury" was exhaustively briefed in the *Radovich* case. The petition for a writ of certiorari on behalf of Radovich requested that this Court consider the question of:

> "2. Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the antitrust laws and injury thereby?" (at p. 2.)

The appellate court had held that Radovich's complaint was insufficient under the antitrust laws because:

> "we doubt that the alleged means, restraint by the reserve cause and its enforcement, is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce." (Ninth Cir., 1956, 231 Fed.2d 620, at p. 623.)

This aspect of the Ninth Circuit opinion was fully supported by the respondents in the *Radovich* case. The National Football League in its brief for respondents claimed that "Plaintiff has failed to allege that any act of defendants upon which plaintiff predicates a claim of injury, was reasonably calculated to prejudice the public interest." (Brief of Respondent,

Radovich v. National Football League, Table of Contents, p. iii; pp. 56-59.)

Apex Hosiery v. Leader, 310 U.S. 469, was urged by the respondents in the *Radovich* case as supporting their proposition that the courts may require a showing that commercial conduct condemned in the antitrust laws involve a "public injury". The briefs of the United States of America as Amicus Curiae briefed this issue of "public injury". In its brief the United States urged that the court below "clearly erred in reading into the statutory authorization the further requirement that the plaintiff in such a suit allege and prove that the violation charged against the defendant was 'calculated to prejudice the public'." (Brief for the United States of America as Amicus Curiae, pp. 11-13.)

This Court after such presentation concluded as follows (352 U.S. 445, 453, 77 S.Ct. 390, 395):

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade.' Times Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public[10] and has provided sanctions allow-

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"[10]In Apex Hosiery Co. v. Leader, 1940, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311, this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and

ing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of forbidden practices as well as the public. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 1948, 334 U.S. 219, 236, 68 S.Ct. 996, 1006, 92 L.Ed. 1328. Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act.[11] Emich Motors Corp. v. General Motors Corp., 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

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services, *all of which had come to be regarded as a special form of public injury.'* (Emphasis supplied) Id., 310 U.S. at page 493, 60 S.Ct. at page 992. In Standard Sanitary Mfg. Co. v. United States, 1912, 226 U.S. 20, 33 S.Ct. 9, 57 L.Ed. 107, speaking of the antitrust laws, the Court said: *The law is its own measure of right and wrong,* of what it permits or forbids, *and the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results.' (Emphasis supplied) Id., 226 U.S. at page 49, 33 S.Ct. at page 15."

"[11]38 Stat. 731, 15 U.S.C. § 16, 15 U.S.C.A. § 16, declares that a final judgment against a defendant in proceedings by the Government for violation of the antitrust laws may be introduced by a private litigant in a subsequent treble damage action and establishes *prima facie* a violation of the antitrust laws."

Yet in spite of this clear declaration that "public injury" is not a jurisdictional requirement under Section 4 of the Clayton Act, the court below has declared that (at page 24):

"The purpose of the antitrust statutes is to protect the 'public' from the harm which follows

> from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort, and which conduct can be described as an undue restraint of trade. Notwithstanding the many phrases which may be picked at random out of numerous cases, and, out of context, be made to support the position that concerted conduct directed at harming the opportunity of a single trader to compete is always within the prohibitions of the Sherman Act, it is our opinion that there exists the need to show facts in a motion such as this from which a court might reasonably infer 'public injury' before an antitrust violation is before the court; and, further, that the Supreme Court has not departed one whit from this requirement."

But recently in *Northern Pacific Ry. Co. v. United States*, ... U.S. ....., 78 S.Ct. 514, the Court stated:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

The antitrust laws, therefore, it has always been thought, afford the public at large protection by providing that private traders operate in the channels of

interstate commerce free of restraints or predatory conduct which hinders or impedes such trade and commerce. The economic charter of liberty envisioned is that traders have a free and open competitive market so that the public will have the advantages of full and unrestrained competition.

B. BINDERUP v. PATHE EXCHANGE HELD THAT THE ANTITRUST LAWS PROTECT "THE LIBERTY OF A TRADER TO ENGAGE IN BUSINESS".

1. Jurisdiction of the federal Courts are supported by Section 4 of the Clayton Act where the alleged matters are matters of interstate trade and commerce and the defendants engaged in a combination or conspiracy in restraint thereof; the conspiracy against a trader doing business in interstate channels by interstate firms necessarily restrains interstate trade and commerce.

Jurisdictional issues in applying Section 4 of the Clayton Act involve only the question of interstate commerce. The entry into a conspiracy by otherwise competitive interstate firms necessarily supplies this jurisdictional requirement. The sum total effect of the conspiracy on the public at large is not a jurisdictional issue. Since the *Radovich* decision has rejected the concept of "public injury" as a jurisdictional requirment, the only remaining issue involved herein is whether or not a conspiracy directed at a single trader may supply the requisite jurisdictional requirements under Section 4 of the Clayton Act. The case of *Binderup v. Pathé Exchange*, 1923, 263 U.S. 291, 44 S.Ct. 96, establishes without question that jurisdictional requirements are met under allegations of the entry into forbidden conduct by otherwise competitive interstate firms against a single

trader. There can be no argument that the complaint in the *Binderup* case, as analyzed by this Court, alleged the entry into conspiracy by the respondents there solely against the petitioner, Binderup. There it was alleged that large interstate distributors of motion pictures entered into a conspiracy to force the petitioner to allow them a share of his business, and upon refusal, combined to boycott him in his business as an exhibitor-distributor. (263 U.S. 291, 303, 44 S.Ct. 96, 97.) This Court held it was error for the trial court to have granted a motion to dismiss the case after the opening statement for lack of jurisdiction. This Court held, 263 U.S. 291, 311-312, 44 S.Ct. 100:

> "Interstate commerce includes the interstate purchase, sale, lease, and exchange of commodities and any combination or conspiracy which unreasonably restrains such purchase, sale, lease, or exchange is within the terms of the Anti-trust Act, denouncing as illegal every contract, combination, or conspiracy 'in restrain of trade or commerce among the several states.' The allegation of the complaint is that the exhibitor had been procuring films from some of the distributors but had refused to buy from others, who thereupon induced the former to cease dealing with him; and that all then combined and conspired in restraint of interstate trade and commerce, to prevent him from carrying on his said business; that they have ever since refused to furnish him with film service and have caused unexpired contracts which he held with some of them to be illegally cancelled. It is difficult to imagine how interstate trade and commerce could be more ef-

> fectively restrained than by suppressing it and that, in effect, so far as the exhibitor is concerned, is what the distributors are charged with doing and intending to do. It is doubtless true that each of the distributors acting separately could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. See United States v. Schrader's Son, Inc., 252 U.S. 85, 99, 40 Sup. Ct. 251, 64 L. Ed. 471; Bobbs-Merrill Co. v. Straus (C.C.) 139 Fed. 155, 191. The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under them —leasing, transportation, and delivery of films— was interstate commerce. The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and 'restricts, in that regard, *the liberty of a trader to engage in business*' (Loewe v. Lawlor, 208 U.S. 274, 293, 28 Sup. Ct. 301, 303 [52 L. Ed. 488, 13 Ann. Cas. 815] and, as a necessary corollary, to restrain interstate trade and commerce in violation of the Anti-trust Act." (emphasis added)

It is most respectfully submitted that if the respondents in the *Binderup* case could not establish the lack of jurisdiction under allegations of a conspiracy directed at Binderup alone, clearly, the court

below was in error in affirming a judgment of lack of jurisdiction because the complaint involved was cast in terms of allegations of injury to a private trader. The affidavits of respondents in summary judgment were admittedly addressed only to the issue of "public injury" and established of themselves the group refusal to deal.

See also *Bigelow v. RKO Radio Exchange,* 1946, 327 U.S. 251, 66 S.Ct. 574 (Petitioner, a motion picture exhibitor, stated to have, as of right, the freedom from restraints imposed by an unlawful conspiracy to discriminate); *Moore v. Mead's Fine Bread Co.,* 1954, 348 U.S. 115, 75 S.Ct. 148 (Federal jurisdiction supported by allegations of forbidden conduct by one large interstate firm directed solely at a single local competitor); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.,* 1954, 346 U.S. 537, 74 S.Ct. 257 (Federal jurisdiction assumed in action involving right of a theatre operator to obtain first-run pictures in a suburban location).

C. THE ISSUES BELOW INVOLVE CONDUCT IN RESTRAINT OF TRADE BY INTERSTATE FIRMS AGAINST A TRADER ENGAGED IN BUYING ARTICLES IN INTERSTATE COMMERCE IN COMPETITION WITH AN INTERSTATE BUYER WHO INTENDS TO MONOPOLIZE A PART OF AN AREA IN INTERSTATE TRADE AND COMMERCE.

In considering the motion for summary judgment, the pleadings upon which the motion is based are to be liberally construed in favor of the party opposing the motion. *Purity Cheese Co. v. Frank Ryser Co.,* 7th Cir., 1946, 153 Fed. 2d 88; *Hoffman v. Babbit Bros. Trading Co.,* 9th Cir., 1953, 203 Fed. 2d 636;

Anderson v. United States, 2nd Cir., 1950, 182 Fed. 2d 296.

As stated in 6 Moore, Federal Practice, Second Edition, Section 56.15(3), page 2123:

> "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issues as to all material facts, which under applicable principles of substantive law, entitle him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy this burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion, all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion."

As such, it was incumbent on the court below to give full faith to the allegations of the complaint of petitioner and the inferences to be drawn from these allegations. This is especially so in view of the reticent affidavits produced by respondents who refused to file affidavits of personal knowledge refuting the allegations of conspiratorial and monopolistic conduct, and prima facie established a group refusal to deal.

1. The proceedings below involved a conspiracy to refuse to deal which is per se forbidden by the antitrust laws.

The court below was faced with the serious and bona fide allegation that the respondents had conspired to refuse to deal with it. (R. 10, allegations 6. d. i.) The affidavits of respondents, as has been pointed out, support these allegations.

This conspiracy is a per se violation of the antitrust laws. *Kiefer Stewart v. Seagram & Sons*, 1951, 340 U.S. 211, 71 S.Ct. 259; *Northern Pacific Ry. Co. v. United States*, 1958, ...U.S....., 78 S.Ct. 514. It is unlawful conduct forbidden by the antitrust laws because:

(a) It is a conspiracy composed of otherwise competitive parties which automatically destroys the free competitive market. *Binderup v. Pathé Exchange*, supra.

(b) It is an non-ancillary agreement in restraint of trade and was unlawful at common law. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271.

(c) It is predatory commercial behavior and allows success to the participants, not because of their established ability and competence, but because of group power. *United States v. Associated Press*, 1945, 326 U.S. 1, 65 S.Ct. 1416.

In this instance it is coupled with plans by the interstate retailer participant to destroy its competitor. (R. 11, allegation 8.)

It is the conspiracy which Section 1 of the Sherman Act condemns when it involves a group refusal to

deal. The illegality of a group refusal to deal consists not in the separate action of each participant, but the conspiracy and combination of all to prevent any of them from dealing with the trader. *Binderup v. Pathé Exchange,* 263 U.S. 291, 44 S.Ct. 96.

When this Court establishes that a conspiracy to refuse to deal is a per se restraint of trade, the violation of the antitrust laws is established upon proof of the conspiracy, and not upon proof of the effect of such conspiracy upon the public. As stated by this court in *United States v. Socony Vacuum Oil Co., Inc.,* 1940, 310 U.S. 150, 221, 60 S.Ct. 811, 843:

> "Any combination which tampers with price structure is engaged in unlawful activity. * * * The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."

In footnote 59, 310 U.S. 150, 224, 60 S.Ct. 811, 845, of said opinion, the Court has pointed out that:

> "*It is the* contract, *combination,* * * * *or conspiracy,* in restraint of trade or commerce", which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. * * * And the amount of interstate or foreign trade involved is not material, * * * since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. [Citing cases.] In view of these considerations a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the

conspiracy embraced but a part of the interstate or foreign commerce in the commodity."

Clearly these phrases are as fully applicable to group refusals to deal which are equally per se forbidden conduct. As such, they are in complete answer to the contentions that there was other merchandise available to petitioner (see also *C. E. Stevens Co. v. Foster & Kleiser Co.*, 1940, 311 U.S. 255, 61 S.Ct. 210) and that the conspiracy only involved petitioner and not other retailers. (*Binderup v. Pathé Exchange*, supra.)

The antitrust statute allows a private trader the right to a direct action for injuries sustained as a result of forbidden conduct affecting the freeflow of interstate commerce. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, at 279:

> "The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private parties and the public against the execution of such contracts and the maintenance of such trade restraints."

2. The proceedings below involved serious predatory monopolistic behavior by a large chain buyer of merchandise which is consistent only with an intent to monopolize a part of an area affecting a substantial amount of interstate commerce.

The complaint alleged that petitioner's competitor Broadway-Hale formulated and organized the horizontal conspiracy above mentioned. In addition it is alleged that the respondents have given Broadway-

Hale special terms and conditions in their sales to insure its success. It is alleged that Broadway-Hale "has purchased and continued to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff." (Tr. 11-12.) No affidavit of personal knowledge was filed by Broadway-Hale showing affirmatively that it was not obtaining special privileges in the purchase of merchandise from the respondents or that it was not actively out to injure the petitioner.

As such the court below was faced with the existence of predatory monopolistic behavior. An offense under Section 2 of the Sherman Act exists when one with chain buying power *intends* to monopolize any part of interstate trade and commerce. Footnote 59, *United States v. Socony Vacuum Oil Co.,* supra; *United States v. Aluminum Co. of America,* 1945, 148 Fed. 2d 416. Clearly the issues raised by the complaint of petitioner and triable under it afford the exercise of federal jurisdiction under the antitrust laws. This case obviously does not deal with two grocerymen doing business in a small community. This action deals with substance. It involves retailers doing a substantial volume of purchases in interstate commerce in one of the major retail areas on the West Coast, Mission Street in San Francisco. This street is renowned in the furniture and appliance industry. It is a major street for the sale of furniture and household appliances in the San Francisco Bay area, the third largest consumer market in the United

States. Broadway-Hale has a major outlet on this street and this respondent, it is not denied, is a chain buyer of interstate merchandise. This interstate chain buyer, it is not denied, actually received and obtained substantial advertising allowances not allowed to its competitor, received special price concessions, and special equipment and demonstrators. These allowances were obtained from the respondents who, as a group, can easily control the retail market in household appliances. This group, it is not denied, have selected Broadway-Hale to dictate market allocations. They have, it is not denied, refused to do business with the competitors of Broadway-Hale if it so requests. This is monopolistic conduct. It is consistent with a plan to monopolize. It is consistent with an intent to monopolize on the part of respondent Broadway-Hale. These serious and substantial issues have simply not been dealt with either by the affidavits of respondents or by the courts below. Section 2 strikes at the dangerous probability of control as well as control. *United States v. Socony Vacuum Oil Co.*, supra, footnote 59. As stated by Learned Hand in *United States v. Aluminum Co. of America*, the antitrust laws strike down at plans to monopolize and will nip them in the bud. 148 Fed. 2d 416, at 431:

> "Although the primary evil was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud."

The major fact established by the moving parties below was that the number of retail outlets selling the products denied petitioner increased *in number*. We have, however, the situation where if petitioner is eliminated from business, there is dangerous possibility that others may be eliminated. There is the situation that if Broadway-Hale received and continues to receive special terms and conditions in its purchases, all other accounts will be reduced to "second run" retail outlets. Despite these dangerous probabilities the court below did not require that respondents inform it of their internal policies and operations. The court did not require that the respondents submit how they classify accounts and how they sell to these classifications. The court below has stated that the antitrust laws are concerned with "substance" but it refused to require that the respondents meet serious allegations of intentions to monopolize with affidavits of "substance". The increase in the number of retail accounts may very well be consistent with a plan to establish only one retailer as a "first class" showcase and to reduce the competition to it to a large number of very small retail stores. Doubts raised by the filing of flimsy and reticent affidavits cannot be resolved against the petitioner.

The court below has emasculated the provisions of Section 2 of the Sherman Act, aimed at the intent to monopolize, and has allowed issues of fact involved in an intent to monopolize case to be decided as questions of law upon the showing of the most unobtrusive affidavits. As such the decision is clearly beyond the

authority of this Court. As such, important antitrust issues were obviated by innocuous summary judgment proceedings. See *Lawlor v. National Screen Service Corp.*, 1957, 352 U.S. 992, 77 S.Ct. 526.

II.

THE COURT BELOW IS ATTEMPTING TO CHART THE POLICIES OF JUDICIAL ENFORCEMENT OF ANTITRUST LAWS WITH INDISCRIMINATE RELIANCE ON CASES OF LIMITED APPLICATION AND WITH IMPROPER INTERPRETATION OF DECISIONS FROM OTHER CIRCUITS.

As a further consideration for the granting of a writ, petitioner respectfully contends that the decision below will subject the private antitrust suit to a sea of doubt. The opinion of the court below will give support or give impetus to dismissal of bona fide complaints under lax summary judgment affidavits. The small businessman will be faced with a decision that attempts to summarize a host of prior authorities and which attempts to apply principles established in an antitrust labor case to the favor of those that the antitrust laws are supposed to curtail. The court below has done the following: (a) It has raised the *Apex* case, a labor case, to the status of the supreme authority of judicial interpretation of the status of the private antitrust action against large aggregations of private capital; (b) it has interpreted the decisions of this court incorrectly and (c) it has summarized a host of private antitrust cases so as to limit federal jurisdiction under the antitrust laws in private cases.

A. THE APEX CASE IS A RULING THAT THE ENTRY INTO CONDUCT FORBIDDEN BY THE ANTITRUST LAWS IS A PUBLIC INJURY WITHOUT MORE.

Considering these contentions in the above mentioned order, petitioner respectfully submits that the ouster of federal jurisdiction under the antitrust laws has been accomplished by the lifting of *Apex Hosiery v. Leader,* 1940, 310 U.S. 469, 60 S.Ct. 982 to the status of being the major authoritative decision as to the principles involving judicial application of the antitrust statutes in private cases. The actual holding of the *Apex* case is that a combination of employees designed to improve labor conditions is not within the ambit of the antitrust laws by the effectuation of strike activity which stops the flow of interstate commerce at an employer's factory. Justice Stone was manifestly distinguishing in his decision the effects of practices by labor groups from conduct which restricts or suppresses ordinary commercial competition. This Court has, it is respectfully submitted, in Footnote 10 in the *Radovich* case established that *Apex* is a holding that the restriction or suppression of competition in the commercial market place is a form of public injury without more. At pages 19-20 of the opinion of the court below, it considers Footnote 10 only as an admonishment and not as a ruling by this Court that *Apex* itself disposes of the issue of "public injury" by stating that conduct forbidden by the Sherman Act is itself the creator of public injury. But *Apex* to the court below meant that it could segregate and classify the type of conduct forbidden by the Sherman Act.

Yet, the attempt to categorize forbidden conduct under the Sherman Act has been precisely and unequivocally rejected by this court. The attempt of the petitioners in *Fashion Originators' Guild v. Federal Trade Commission,* 1941, to urge on this court the same categories as used by the Ninth Circuit met with rejection. 312 U.S. 457, 466, 61 S.Ct. 702.

Clearly a conspiracy to boycott to prevent a retailer in a substantial market to obtain commodities flowing in interstate trade and the entry into a plan to monopolize a part of this trade and the oppression of a trader doing business which affects such trade is a "control of the market to the detriment of *purchasers* or consumers of goods and services."

Next, the court below relied on *Times Picayune Pub. Co. v. United States,* 1953, 345 U.S. 594, 73 S.Ct. 872, as applicable to an antitrust action involving a group conspiracy. This case did not hold that the federal courts were without jurisdiction to decide the merits of the controversy between the newspaper and the United States, but only that after an extensive trial involving the testing of information of substance and materiality that the United States had not made out a case. This case is a clear guide to the type of information and statistics that must be filed under summary judgment procedure and at trial to establish such a decision. To determine reasonableness, the Court held, involves inquiry as to "the percentage of business controlled, the strength of remaining competition and whether the action springs from business

requirements or purpose to monopolize". The affidavits of the respondents below failed for the most part to give the court such information. Such information if given would not relate to a per se conspiracy charge as involved here. See also *Northern Pac. Ry. Co. v. United States,* 1958, ... U.S. ....., 78 S.Ct. 514.

B. THE TENTH CIRCUIT HAS REJECTED THE REQUIREMENT OF PUBLIC INJURY SET FORTH IN FEDDERSON MOTORS v. WARD, AND SHOTKIN v. GENERAL ELECTRIC.

The court below supports its decision by citation to *Shotkin v. General Electric Co.,* 10 Cir., 1948, 171 Fed. 2d 236, and *Fedderson Motors v. Ward,* 10 Cir., 180 Fed. 2d 519. The proposition advanced is that some restraints of trade are so remote in their effect on the public at large that they are not restraints for Sherman Act purposes. (Opinion below, p. 24.) But the Tenth Circuit in *New Home Appliance Center v. Thompson,* 1957, 250 Fed. 2d 881, has now held that the test of a restraint of trade is not to be viewed as to its effects on the public at large but, rather to the type of conduct entered into by the defendants and their dealings in interstate commerce. It states at p. 884:

> "But, any horizontal agreement among local competitors or with manufacturers, which has the purpose and effect of fixing or stabilizing prices at local levels, or apportioning territories, or suppressing competition, is illegal per se if interstate commerce is utilized, or if such concerted acts have the effect of restraining the free flow of interstate commerce. See Moore v. Mead's Fine

Bread Co., 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145; United States v. Frankfort Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951; United States v. McKesson & Robbins, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209. In these circumstances, the amount or quantity of interstate commerce is unimportant, it is the nature or the tendency of the agreement which the act proscribes, Gamco, Inc. v. Providence Fruit & Produce Bldg., 1 Cir., 194 Fed. 2d 484; United States v. McKesson & Robbins; supra."

C. THE ANTITRUST LAWS ARE A CHARTER OF LIBERTY AND HAVE UNRESTRICTED APPLICATION.

Next, the court below has vitiated the principle of law which has been stated in various private antitrust cases that the federal courts under the antitrust laws are concerned when competitors combine to the injury of a trader. It says that all cases support the proposition that the antitrust laws are not concerned with conduct which does not harm the public at large. It thereupon attempts the following categorization: (a) a private party can obtain federal jurisdiction under the antitrust laws only when he is one of a few competitors and his elimination will thereby substantially affect competition; or (b) only when the defendants possess large scale monopolistic power derived from nationwide enterprises, and such power is used to eliminate him; or (c) only when the defendants control or attempt to control *all* competition, and/or the private party is a member of an *entire* class to which a conspiracy is directed. (Opinion below, p. 29.)

But the cases analyzed by the court below simply do not hold in their decisions that the above mentioned factors are the bases for their decisions.

1. The antitrust laws are not necessarily concerned with control over all competition.

Three motion picture cases decided by this Court, *United States v. Paramount Pictures, Inc.*, 1948, 334 U.S. 131, 68 S.Ct. 811, *United States v. Schine Chain Theatres, Inc.*, 334 U.S. 110, 68 S.Ct. 947, *United States v. Griffith*, 1948, 334 U.S. 100, 68 S.Ct. 941, involve the monopolization of early run motion pictures. They point out explicitly that defendants do not have to attempt to control all the market or all competitors to run afoul of the act. It is sufficient if the conduct of the defendants is an attempt to reach the "cream" of the business or a segment of the market. These cases clearly required the courts below to demand that manufacturer-distributor respondents inform them as to whether or not Broadway-Hale was their only "first class" customer and how they classified their retail accounts. The total number of competitors sought to be controlled in these cases was not deemed controlling. Thus this Court was not concerned with the total number of theatres in an area but rather with the conspiracy to control the "first run" theatre market.

2. Given the jurisdictional requirements of interstate commerce, the lower courts have protected the single trader from predatory conduct in restraint of trade.

Lower court decisions of other circuits involving private actions cited by the court below, *White Bear Theatre Corp. v. State Theatre Corp.*, 8th Cir., 1942,

129 Fed. 2d 600, *William Goldman Theatres v. Loew's Inc.*, 3 Cir. 1945, 150 Fed. 2d 738; *Paramount Film Distributing Corp. v. Village Theatre,* 10th Cir. 1955, 228 Fed. 2d 271; *Victor Talking Machine v. Kemeny,* 3 Cir., 1921, 271 Fed. 810; *Roseland v. Phister,* 7 Cir., 1942, 125 Fed. 2d 417; *Package Closure Corp. v. Sealright Co.,* 2 Cir., 1944, 141 Fed. 2d 972; *Johnson v. J. H. Yost Lumber Co.,* 8th Cir., 1941, 117 Fed. 2d 53, were holdings that the antitrust laws afford protection to private traders and that private traders have the right to operate in interstate channels free of the conduct condemned in the antitrust laws. They simply do not base their decisions on the categories suggested by the Ninth Circuit.

The *White Bear* court condemned the attempts of a theatre operator to eliminate a competitor in a small city in Wisconsin. It held at 129 Fed. 2d 600, 604:

> "The attempts of defendants to monopolize the 'first run' films in commerce, for the purpose of putting the plaintiff out of the motion picture theatre business at White Bear Lake must consequently, on plaintiff's evidence, be held to have presented a case for the jury, under the Sherman Act."

The court found an inherent injury to the public interest on the showing that the defendants had entered into conduct which interfered with the "competitive freedom in buying and selling" in a market affecting interstate trade and commerce.

The *Goldman* court decided that the control of a very small part of the total number of theatres in

Philadelphia, the first run theatres, by a circuit theatre operator was a part of interstate trade and commerce which could be monopolized; and that a conspiracy of this first run operator with interstate distributors of motion pictures directed at the plaintiff was within the Sherman Act. The decision of the Second Circuit allowed plaintiff recovery because "plaintiff does have the right to have its business protected if there is a concert of action *directed at plaintiff*, which results *in its removal* from competition." The Second Circuit did not discuss whether the defendants were improperly fixing prices or whether the public was being deprived of the right to see motion pictures. The destruction of the free market, unduly hindering or obstructing the free flow of commerce in the channels of interstate trade had, however, been proved. "Combination which unreasonably limits competition which would otherwise exist is illegal." (150 Fed. 2d. 743.)

Roseland v. Phister involved the market opportunities of an agent of the defendant. The conduct condemnable was not aimed at class of agents, but at the destruction of the free market in which plaintiff was doing business. Section 4 of the Clayton Act was held to have afforded any person a direct remedial right, not subsidiary to the public right, for the recovery of damages suffered from the entry into conduct of the type condemned by the Sherman Act.

Victor Talking Machine Co. v. Kemeny held that a retailer has a direct cause of action against distributors engaged in interstate commerce who have entered

into a conspiracy to refuse to deal with him. 271 Fed. 810, 818.

Both the *Village Theatre* case and the *J. H. Yost Lumber Co.* case involved trial on the merits. In each case the conspiracies were directed at private traders. The *Village Theatre* case involved a single vertical conspiracy between a chain buying exhibitor, its parent and an interstate distributor.

The *Package Closure* case involved a conspiracy to drive the plaintiff out of business by interstate manufacturers who held substantial monopoly control over the manufacture and sale of bottle hoods. But the decision of the court does not base the plaintiff's right to its jurisdiction on the proof of injury to the public at large, but rather, that forbidden conduct had been entered into by the defendants with the purpose of destroying the single plaintiff.

The court stated at 141 Fed. 2d 972, 978:

> "Accordingly, when persons aim not to compete but to eliminate competition, when, with that intent, they combine to fix prices so as to destroy a rival, and when their conduct has that effect, the injured rival may recover three times the resultant damages. It is defendants' price fixing conspiracy for the illegal purpose and with the consequence alleged by plaintiff which gives plaintiff here a good claim under the Act."

In *Package Closure* the conspirators unreasonably lowered prices against plaintiff; here they agreed to discriminate against him, not to sell to him, and to allow the effectuation of a monopolistic intent.

In short the lower courts have not based their decisions conferring federal jurisdiction to private parties under the antitrust laws because of the classifications suggested by the Ninth Circuit. These courts have sought to find the following: (1) whether the complaint alleges the type of conduct forbidden by the antitrust laws; (2) whether the parties are in or involve or affect interstate trade and commerce; and (3) whether or not the private plaintiff was faced with the destruction of a free and open competitive market to his injury and damage.

The court below, it is respectfully submitted, has confused jurisdictional tests under the antitrust laws which are concerned only with interstate commerce, with "violation" tests which involve reasonable or unreasonable conduct. That the free flow of interstate commerce, supporting federal jurisdiction, is impeded when a combination stops the flow of merchandise in interstate channels to *a single trader* has been authoritatively set forth in the *Binderup* case. That the court is in error in attempting to apply the unreasonableness test to "interstate trade and commerce" issues, by saying the public at large must be affected by the conduct condemned in the antitrust laws, has been authoritatively stated in the *Radovich* case.

A decision which denies the rights of a single trader to federal antitrust protection, a charter of economic liberty, ought not, it is respectfully submitted, be allowed to prevail.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
May 28, 1958.

Respectfully submitted,

MAXWELL KEITH,
IRVIN GOLDSTEIN,
Attorneys for Petitioner.

(Appendices A, B and C Follow.)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KLOR'S, INC., *Appellant,* vs. BROADWAY-HALE STORES, INC., et al., *Appellees.*	No. 15,380 Mar. 28, 1958

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: DENMAN, BARNES and HAMLEY, Circuit Judges.

BARNES, Circuit Judge:

I. The Private Plaintiff in Antitrust Litigation.

Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained."

Passing for the present an examination of what "thing" is forbidden, we note a tendency in some courts to narrow the apparent scope of this statute due to concern with the severity of the penalty.[1]

In a recent case this Court said:

> "A niggardly construction of the treble damage provision would do violence to the clear intent of Congress. The pri-

[1] **Snow Crest Beverages Inc. v. Recipe Foods, Inc.**, D.Mass., 1956, 147 F.Supp. 907, 909; **Harrison v. Paramount Pictures Inc.**, E.D.Penn. 1953, 115 F.Supp. 312; **Cf: Congress Bldg. Group v. Loews, Inc.**, 7. Cir., 1957, 246 F.2d 587.

vate antitrust action is an important and effective method of combating unlawful and destructive business practices. The private suitor complements the government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398, cert. denied, 355 U.S. 835 (1957).

Of more importance is what the Supreme Court has said. In reversing an antitrust case from this Circuit in 1957, that Court admonished the trial and appellate federal courts that:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' [citing cases] and meet the requirement that petitioner has thereby suffered injury."[2]

With these principles in mind, we proceed to an examination of what is forbidden by the antitrust laws, as stated in Section 4 of the Clayton Act.

The Sherman Act's first and second sections are relied on by the pleadings in this case.[3]

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[2] **Radovich v. National Football League**, 1957, 352 U.S. 445, 453:
"Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. [Citing cases] Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. [Citing cases] In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." **Ibid.**

[3] 15 U.S.C. §1: "Every contract, conbination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal. . . ."
15 U.S.C. §2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor. . . ."

Does the Sherman Act mean *every* contract, and *every* restraint, or must it be interpreted? Must it be aided by a Rule of Reason, and if so, what is that Rule of Reason? The problem is not a new one, nor is it easy. Not only do competent judges disagree—they frequently reach similar destinations by differing circuitous routes.[4]

Suffice it to say that from a period shortly after the early pronouncements of our Supreme Court which made the Sherman Act a comparatively dead law,[5] succeeding Supreme Court Justices have found it necessary to interpret the precise language used in the Act and determine its proper construction.[6] Even such a "literalist" as Mr. Justice Peckham eventually came to that view,[7] at least with regard to what constituted interstate commerce, even if he could not agree with Mr. Justice White on what was meant by "every restraint." And, although the statu-

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[4]"Unity of decision does not always require unity of theory." Handler, Antitrust in Perspective 11 (1957).

[5]See, **e.g., United States v. E. C. Knight Co.**, 1895, 156 U.S. 1.

[6]Compare **United States v. Joint Traffic Association**, 1898, 171 U.S. 505, 567-8, with **United States v. Trans-Missouri Freight Ass'n**, 1897, 166 U.S. 290, 312, where similar contracts with similar purposes (design to fix freight rates) were under consideration.

[7]"The Act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among businessmen that could not be said to have, indirectly or remotely, some bearing on interstate commerce and possibly to restrain it." **Hopkins v. United States**, 1898, 171 U.S. 578, 600.

[8]Professor Handler tells how Mr. Justice White "avoided the embarrassment of the word 'every' in two ways. First, he regarded the Sherman Act as codifying the common law and . . . embodying the same rule of reason sanctioned by prior law. 16/ (United States v. Trans-Missouri Freight Asso., 1897, 290, 353-356.) Second, he asserted that the phrase 'restraint of trade,' both in the prior decisions and the statute, signified illicit arrangements only. 17/ (**Id.** at 345-352.) Under this view, if an agreement was reasonable, it was not in restraint of trade. According to White's theory, the rule of reason had been built into the very words and structure of the legislation. . . .

White . . . in his **Standard Oil** and **American Tobacco (United States v. American Tobacco Co.**, 1911, 221 U.S. 106) opinions . . . by this

tory language "is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition."[8a]

With this brief introduction, let us turn to the pleadings and evidence of this case.

II. The Pleadings.

Plaintiff corporation sues many defendants, claiming a cause of action under Sections 4 and 16 of the Clayton Act,[9] by reason of defendants' alleged violation of Sections 1 and 2 of the Sherman Act.[10]

The complaint alleges plaintiff is the owner and operator of a retail store engaged in the business in San Francisco of selling radios, television sets, clothes washers, refrigerators, electric and gas stoves, phonographs and various electrical appliances. Plaintiff charges defendant Broadway-Hale Stores, Inc., a corporation, is a competitor in the purchase and sale of such household appliances, operating a chain of stores in the western states and one specific store in the general vicinity of plaintiff's retail store in the Mission District area of San Francisco, California. The eighteen other defendants named are ten leading manufacturers[11]

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strained rationale . . . finally succeeded in introducing a rule of reason into our antitrust jurisprudence. • • •

Under (Mr. Justice) Taft's view, there was no place for a rule of reason where the restrictions on competition were nonancillary. • • •

. . . [T]he English courts had . . . abandoned the initial rule of total invalidity (of restraints of trade) and enforced agreements not to compete when ancillary to some major lawful purpose and reasonable in duration and extent. . . . • • •

. . . [C]ommon law . . . did not employ the phrase 'restraint of trade' synonymously with illegality." Handler, Antitrust in Perspective, 11 (1957).

[8a]**Northern Pacific Railway Co. v. United States**, 1958, 355 U.S. 649, 651, citing **Standard Oil Co. of New Jersey v. United States**, 1911, 221 U.S. 1, and **Chicago Board of Trade v. United States**, 1918, 246 U.S. 231.

[9]Title 15 U.S.C. §§15, 26.

[10]Title 15 U.S.C. §§1, 2.

[11]Admiral Corporation; Zenith Radio Corporation; Whirlpool-Seeger Corporation; Radio Corporation of America; Emerson Radio and Phono-

and eight distributors[12] of such household appliances mentioned above.

Plaintiff charges that all defendants beginning prior to 1952 "have restrained trade and commerce in the interstate distribution and sale" of the described types of goods in the San Francisco area "by contracting, combining, conspiring together, and each with the other in restraint and monopoly of such trade and commerce" and "have substantially lessened, limited, and restrained competition in said trade and commerce."[13]

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graph Corporation; Philco Corporation; Rheem Manufacturing Company; General Electric Company; Olympic Radio and Television, Inc.; and Tappan Stove Company.

[12]Admiral Distributors, Inc.; H. R. Basford Company; Leo J. Meyberg; Jefferson-Travis, Inc.; Philco Distributors, Inc.; General Electric Dist. Corporation; Olympic Television of Northern California; and O'Keefe and Merritt Company.

[13]Plaintiff's pertinent allegations were:

"• • • 6. • • • Beginning at a period prior to 1952, and continuing uninterrupted up to and including the date of filing this complaint, the defendants, all well knowing the facts herein alleged, have restrained trade and commerce in the interstate distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances in the San Francisco Bay Area, by contracting, combining, conspiring together, and each with the other, in restraint and monopoly of such trade and commerce contrary to Sections 1 and 2 of the Act of Congress . . . 15 U.S.C.A., Sections 1 and 2, and have thereby substantially lessened, limited and restrained competition in said trade and commerce, and have prevented plaintiff from obtaining (the above articles) for resale; and have discriminated against plaintiff and in favor of plaintiff's competition in the sale and distribution of the products; and have refused to sell to or enter into any contract to sell products to plaintiff. Such combination, conspiracy and agreement tend to and do actually restrain and monopolize interstate commerce in the distribution and sale of (the listed products) in favor of Hale. More particularly, the manufacturer-distributor defendants in pursuing a policy in favor of Hale and against plaintiff have done and are continuing to do the following acts:" There then follows a list of nine particular acts which defendants are alleged to have done, all directed solely at plaintiff and in favor of the defendant Broadway-Hale. • • •

"8. The defendant Hale operates a chain of key stores in the west coast area of the United States. It enjoys a monopolistic buying power

Various alleged discriminations in sale, supply, price, terms, etc., are charged in count one of the complaint as part of the conspiracy. Counts two through thirty-one charge violations of the Robinson-Patman Act[14] and counts thirty-two through forty-one charge violations of § 13(f) of the Robinson-Patman Act[15]—discrimination in price, services, etc.

III. Proceedings in the District Court.

By pre-trial order count one was limited to a single conspiracy charging a Sherman Act violation.[16]

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by reason of the large number of retail outlets it operates. It has used its monopolistic buying power to negotiate terms and conditions of acquisition and purchase of the products manufactured, distributed and sold by the manufacturer-distributor defendants. It has used its monopolistic buying power to deny to plaintiff its competitive position in the acquisition, purchase and sale of the products manufactured, distributed and sold by the manufacturer-distributor defendants and, in particular, has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff. The manufacturer-distributor defendants have dealt with Hale throughout the period of time alleged on a chain basis and have manufactured, distributed and sold products for resale in the San Francisco Bay Area in consideration of manufacturing, distributing and selling the products to Hale for resale in other parts of the West Coast area of the United States. • • •

"9. By reason of the monopoly buying power of defendant Hale, and the illegal and discriminatory tactics, combinations, conspiracies and agreements in restraint of trade by the manufacturing-distributor defendants acting in collaboration, the business of plaintiff has been seriously impaired, injured and damaged, and the plaintiff has suffered great damage in loss of profits, good will, reputation and prestige of its store as a retail dealer in (the listed products). Plaintiff has been paying unreasonable and discriminatory prices and has been subjected to unfair, unreasonable and discriminatory practices to the damage and loss of plaintiff and to the advantage of defendants, all by reason of the defendants' violation of the anti-trust laws."

[14]Title 15 U.S.C. §13(a), (d) and (e).

[15]Title 15 U.S.C. §13(f).

[16]"1(a) . . . Count one of the Complaint is and shall in all further proceedings be interpreted and construed as one seeking relief solely with

Subsequently, under Federal Rules of Civil Procedure 42(b), the trial court ruled:

> "Count one of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action."

All but one of the defendants (18 of 19) then moved to dismiss count one of the complaint,

> ". . . for failure to state a claim upon which relief can be granted, and for summary judgment on said Count One on the ground that there is no genuine issue as to any material fact and the moving parties are entitled to a judgment as a matter of law."

In support of this motion, the moving parties submitted a dozen affidavits. Appellant stood on the pleadings and papers on file, filing no documents in opposition to the motion. It should be noted here that the court below did not rule on the pleadings nor grant the motion to dismiss by reason of any failure therein. While a motion to dismiss was made, it was apparently passed over so that the motion for summary judgment could be determined. That latter motion having been granted, it was necessarily dispositive of the motion to dismiss.

The District Court granted the motion for summary judgment by preliminary order and subsequent formal judgment.[17] The preliminary order is short, and reads as follows:

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respect to a conspiracy under the Sherman Act . . . and not as seeking to assert any claim for relief under the Robinson-Patman Act. . . .

(b) Count one of the Complaint is amended by striking the words 'combinations, conspiracies and agreements' in paragraph 9, . . . and substituting the words 'combinations, conspiracy and agreement'. . . ." (Tr. p. 20.)

[17] "The Court having heretofore on June 8, 1956 and on June 22, 1956 made its orders for separate trials by virtue of which Count One of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action, and defendants having thereafter severally moved to dismiss Count One of the complaint and the claim for relief tendered thereby and for summary judgment

"It appears from the allegations of count one of the complaint and from the undisputed affidavits supporting the motion for summary judgment that there is no genuine issue of fact respecting the claim for relief tendered by count one of the complaint.

Count one is not a cause of action under the Sherman Anti-Trust Act. It is not concerned with private damages caused by a public wrong proscribed by the Act.

It is just the case of a retail store in the Mission District of San Francisco—one of hundreds in the city engaged in selling the same kind of merchandise—which has a plaint that certain supplier defendants won't sell it some merchandise, allegedly at the behest of one of its competitors. It is purely a private quarrel, (perhaps otherwise legally remediable) arising out of some undisclosed cause—the nature of which we may suspect, but do not know.

There is not the slightest basis either in substantiality or law for the exercise of our jurisdiction.

The motions are granted. . . ."

This appeal is from the motion granting summary judgment. Count one alone is involved. The other forty counts are not before us.

IV. The Issues.

Appellant makes but one specification of error—namely, that it was error to grant a motion for judgment or dismiss a com-

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thereon, and it appearing that there is no genuine issue of fact respecting the claim for relief tendered by said Count One,

It Is Hereby Ordered, Adjudged and Decreed that said motions to dismiss and said motions for summary judgment are and each of them hereby is granted, and that said Count One and the claim for relief tendered thereby be and they are hereby dismissed as to each and every defendant, and that plaintiff take nothing by them, and the Court hereby expressly determines that there is no just reason for delay in the entry of the foregoing judgment and the clerk is hereby expressly directed to enter the foregoing judgment forthwith. . . ." [Tr. pp. 135, 136.]

plaint seeking damages under § 4 of the Clayton Act based upon an alleged violation of the Sherman Act plus consequent damage to plaintiff because the complaint had failed to allege and plaintiff had failed to prove, as an additional element, a "public injury."

Appellees do not agree that the trial court's action (and alleged error) can be so described. They agree that if there has been alleged a violation of the Sherman Act, plus consequent damage to a private plaintiff, a cause of action is stated. They claim a violation of the Sherman Act was not pleaded, and more important, not established by the evidence before the court on the motion to dismiss. This was because the restraint of trade relied on was not a restraint of trade recognized as such at common law which constitutes a per se violation of the Sherman Act; and in the absence of such a type of violation, there must be alleged a restraint, injurious to the public if proved, in order to constitute an actionable violation of the Sherman Act, either in pleading or proof. The question before the trial court, say appellees, and now here, is this:

> "(1) Is the charged restraint of trade of a kind falling within the purview of the Sherman Act?"

and secondarily,

> "(2) Does the conspiracy have the necessary relation to interstate commerce?"

Both questions must be answered affirmatively, say appellees, before appellant can prevail.

To put it another way, appellant contends that *any* contract, combination or conspiracy which restrains trade or commerce, no matter in what degree and no matter against whom or how many persons similarly situated the restraint is directed, *always* violates the Sherman Act proscription.

Appellant argues that

> "[T]he public in any part of interstate commerce is entitled to the competition of *all* traders and the public interest is *necessarily* impaired when *a* trader is eliminated. . . . The antitrust laws are a trader's statute which protect the trader

from unlawful conduct in restraint of trade in order to insure that the public obtains a true competitive market."[18]

Appellees, on the other hand, contend with equal vigor that not every restraint upon a single competitor is a restraint of trade or commerce within the meaning of the Sherman Act. They argue, in essence, that a plaintiff, in order to succeed on this motion for summary judgment must allege in his complaint (if he is willing to rely solely upon it in opposition to appellees' affidavits) sufficient facts to prove, or from which it may be inferred, that the public as a whole is or may be in some way affected by the defendants' conduct; *i.e.*, that the conduct attacked has some *substantial* effect on the particular relevant market involved.

Appellant quotes at length from, and largely relies upon, both the briefs filed and the opinion rendered in *Radovich v. National Football League*,[19] certain motion picture antitrust cases, e.g. such as *United States v. Paramount*, 1948, 334 U.S. 131; *United States v. Schine*, 1948, 334 U.S. 110; *United States v. Griffith*, 1948, 334 U.S. 100; *Bigelow v. R.K.O.*, 1946, 327 U.S. 251; *Binderup v. Pathe*, 1923, 263 U.S. 291; *Hart v. B.F. Keith Vaudeville Exchange*, 1923, 262 U.S. 271, and pleadings cases like *United States v. Employing Plasterers Ass'n.*, 1954, 347 U.S. 186.

It is appellant's position that "Radovich . . . overruled this court and thus overruled its principal supports, *Fedderson*[20] and *Shotkin*."[21]

Appellees urge that they have carefully maneuvered around the pitfall of a motion to dismiss premised on the pleadings; that they have filed twelve affidavits uncontradicted by anything other than the complaint, as amended by pre-trial order;[22] that

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[18]Appellant's Opening Brief, p. 7. (Emphasis added.)

[19]352 U.S. 445 (1957).

[20]180 F.2d 519 (10 Cir. 1950).

[21]171 F.2d 236 (10 Cir. 1948).

[22]The voluntary amendment of the complaint as to damages is here immaterial.

the court passed on an "undisputed factual situation;"[23] and, that the trial court's finding and the summary judgment based thereon is required by §§ 1 and 2 of the Sherman Act, as interpreted by the Supreme Court, particularly in *Apex Hosiery v. Leader*, 1940, 310 U.S. 469, and those cases which are claimed to follow it.

V. The Facts.

The facts, as set forth in the affidavits, and undisputed by appellant, were summarized by appellees as follows:

> "Appellant and appellee Hale are not the only retailers of appliances in San Francisco. There are literally hundreds, if not thousands, of others (R. 25-27). The classified section of the San Francisco Telephone Directory contains 14 pages of listings (R. 29-43). In San Francisco alone are sold not only the brands of appliances involved in this case but many other competing brands (R. 26-27). In addition to the 7 brands of television sets, radio and phonographs mentioned in the complaint, there are 20 other competing brands sold in San Francisco. In addition to the three mentioned brands

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[23] "The Court: You're really relying, then, on not so much the motion to dismiss as on the motion for summary judgment.

Mr. Lasky: I think it's a motion for summary judgment.

The Court: You are stating that as a matter of fact that a case is not stated because of an undisputed factual situation. • • •

Mr. Goldstein: May it please the Court, the conspiracy charged in count one of the complaint is this: No matter how counsel may attempt to avoid it, no matter how abstruse are some of his deductions, it does amount to this and on which the plaintiff rests his case. • • •

The Court: Well, all that I was endeavoring to do, Mr. Goldstein, was to get the question down to a somewhat simple basis. The private right in antitrust arises out of the private damage because of the public wrong.

Mr. Goldstein: Yes, sir.

The Court: In other words, it doesn't arise out of a private wrong; it arises out of a public wrong.

Mr. Goldstein: There must be, as I have conceded, there must be some public interest.

The Court: And the private individual where there is a public wrong has only a cause of action when he can show that the public wrong caused him some damage.

Mr. Goldstein: Yes, sir. • • •" [Tr. pp. 145, 146.]

of refrigerators there are 18 other competing brands. In addition to the 5 mentioned brands of stoves, there are 23 competing brands; in addition to the 2 mentioned brands of clothes washers and dryers, there are 30 competing brands. Among these competing brands are many of the outstanding and most widely advertised brands in the country, including the names Capehart, Crosely, Du Mont, Hallicrafter, Hoffman, Magnavox, Motorola, Packard-Bell, Scott, Westinghouse, Amana, Bendix, Coldspot, Frigidaire, Hotpoint, International Harvester, Kelvinator, Norge, Servel, Chambers, Roper, Thermador, Western Holly (see listing at R. 26-27). Appellant does not charge that he was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to this action.

Moreover, a large number of other retailers sell to the San Francisco public the very brands referred to in the complaint. At the date of filing suit the number of dealers *in San Francisco* handling these products was as follows: (See note 24/.)

In the *Mission District alone*, in San Francisco, there are 53 dealers selling the brands referred to in the complaint. Restricting the area under consideration even more narrowly, *to Mission street alone*, a member of the public desiring to purchase an appliance and strolling down Mission Street for a span of but 11 blocks, of which appellant's store is approximately in the center, would pass the shops of 43 re-

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24"Admiral products ..... 195 retailers (R. 45)
Zenith products ..... 153 retailers (R. 48)
Whirlpool products ..... 67 retailers (R. 50)
RCA products ..... 127 retailers (R. 52)
Emerson products ..... 109 retailers (R. 54)
Philco products ..... 175 retailers (R. 58)
Rheem products ..... 56 retailers (R. 62)
GE products ..... 110 retailers (R. 66)*
Olympic products ..... 33 retailers (R. 116)
Tappan products ..... 13 retailers (R. 118)
O'Keefe & Merritt products ..... 65 retailers (R. 121)

*The figure given is for GE television dealers. The figure for GE major appliance dealers is 54 and for dealers in GE radios and traffic appliances it is 463."

tailers, selling the specific items and brands referred to in the complaint. Defendants' Exhibit A on the motion (R. 146) is a chart bringing together the factual data taken from the 12 affidavits. Since it strikingly exemplifies the fact, a copy is inserted opposite this page.

Finally, it may be noted that while the alleged conspiracy is charged as having begun prior to 1952 (R. 9), the number of retail stores in San Francisco selling the items and brands referred to in the complaint steadily increased after 1952 and up to the time of the commencement of the suit. Admiral dealers increased from 150 to 195, and in the Mission District alone from 20 to 36; Zenith from 120 to 153; Whirlpool dealers from 40 to 47; Emerson from 40 to 109 and in the Mission District alone from 13 to 29; Philco from 79 to 175 and in the Mission District alone from 22 to 47; Wedgewood Stove dealers from 41 to 56 and from 8 to 9 in the Mission District alone; General Electric dealers and RCA have run into the hundreds for years and there have been no material variations. (This data appears in the 12 affidavits, R. 25 to 125)."

VI. The Law.

Apex Hosiery Co. v. Leader, supra, teaches that not every restriction on commerce is a restraint of trade within the meaning of the Sherman Act.

First, the restraint must "occur in or affect commerce between the states • • • for constitutional reasons." *Id.* at 498.

We need not concern ourselves here with the substantiality of the amount of commerce involved. *Apex* tells us "it is the nature of the restraint and its effect on interstate commerce, and not the amount of the commerce which are the tests of violation." *Id.* at 485.[25]

Second, "the restraints at which the Sherman law is aimed, and which are described by its terms, *are only those which are*

[25]Citing **United States v. Socony-Vacuum Oil Co.**, 1940, 310 U.S. 150, 225. See also, **Times-Picayune Pub. Co. v. United States**, 1953, 343 U.S. 594, 611; **Lorain Journal Co. v. United States**, 1951, 342 U.S. 143, 151, n. 6; **United States v. Paramount Pictures**, 1948, 334 U.S. 131, 173; **United States v. Yellow Cab Co.**, 1947, 332 U.S. 218, 225-226.

comparable to restraints deemed illegal at common law. . . ." [Emphasis added.] *Id.* at 498. The drafters of the Sherman Act "extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law. . . ." *Ibid.*

In deciding the question of whether a conspiracy of workers to stop factory production was "the kind of restraint of trade or commerce at which the Act is aimed,"[26] the Supreme Court in *Apex* had the same question (in different form) to answer as is here raised by the motion to dismiss. It is to be remembered that in *Apex* this question was required to be answered "even though a natural and probable consequence of their (the strikers') acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer."[27]

> "The critical words which circumscribe the judicial performance of this function so far as the present case is concerned are 'Every . . . combination . . . or conspiracy in restraint of trade or com. rce.' Since in the present case, as we have seen, the natural and predictable consequence of the strike was the restraint of interstate transportation *the precise question which we are called upon to decide is whether that restraint* resulting from the strike maintained to enforce union demands by compelling a shutdown of petitioner's factory *is the kind of 'restraint of trade or commerce' which the Act condemns.*"[28]

The court then traces some of the background of the Sherman Act and states:

> "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers

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[26] **Apex Hosiery v. Leader**, 1940, 310 U.S. 469, 487.

[27] **Ibid.**

[28] **Id.** at 490. (Emphasis added.)

of goods and services, all of which had come to be regarded as a special form of public injury.[29]

• • •

For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce."[30]

In *Apex* Justice Stone went on:

"The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman Law. They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. . . .

In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination

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[29]Id. at 493.

[30]Id. at 494-495.

in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints.

That such is the scope and effect of the Sherman Act was first judicially recognized and expounded in the classic opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, affirmed 175 U.S. 211, written by Judge, later Chief Justice, Taft, and concurred in by Justice Harlan and Judge, later Justice, Lurton, of this Court. This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce.

• • •

In thus grounding the 'rule of reason' upon the analogy of the common law doctrines applicable to illegal restraints of trade the Court gave a content and meaning to the statute in harmony with its history and plainly indicated by its legislative purpose. Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of

articles moving in interstate commerce is (sic) not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. (Citations omitted.)

• • •

Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in *Appalachian Coals v. United States, supra,* because notwithstanding its effect upon the marketing of the coal it nevertheless was not intended to and did not affect market price."[31]

Radovich v. National Football League, 9 Cir., 1956, 231 F.2d 621, was a pleading case. In it, this Court decided on two grounds that plaintiff's complaint did not state a cause of action. The first ground was that football was more like baseball *(Toolson v. New York Yankees,* 1953, 346 U.S. 356; *Federal Baseball of Baltimore v. National League,* 1922, 259 U.S. 200) than like boxing *(United States v. International Boxing Club,* 1955, 348 U.S. 236). Secondly, if wrong on the first premise, then Radovich's complaint did not "allege facts from which it can be determined as a matter of law that by reason of intent, tendency, or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce," quoting from *Fedderson Motors v. Ward,* 10 Cir., 1950, 180 F.2d 519, 522.

Radovich alleged that there was a conspiracy to eliminate football leagues not affiliated with the defendant, hence, defend-

[31]Id. at 497-502.

ants were creating a monopoly. The method alleged was to control the players by the "reserve clause" and "black-lists." The alleged intent of the defendants in *Radovich* was to "boycott and ruin defendant's competitor, the All-America Conference." This Court concluded that the means alleged were not calculated to prejudice the public or unreasonably restrain interstate commerce. This Court failed "to discover any basis to say that the appellant has pleaded that All-America or any other league was ruined, would be ruined or substantially affected by the complained of acts," and therefore felt there were no facts pleaded leading to the conclusion that the public had been adversely affected.

The Supreme Court (352 U.S. 445) considered both grounds relied on by this Court to affirm the District Court and found them untenable. We are not concerned here with the Supreme Court's refusal to approve this Court's conclusion as to the similarity between football and baseball. But appellant herein strongly relies upon the pronouncement of the Supreme Court with respect to the second point: public injury. After disposing of the essential allegations of the substantial effect upon interstate commerce, the Supreme Court said:

> "We find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Justice Holmes in *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 274 (1923), is whether 'the claim is wholly frivolous.' While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, 'we are not prepared to say that nothing can be extracted from this bill that falls under the Act of Congress . . .' Id., at 274."[32]

The Court then cites *United States v. Employing-Plasterers Association, supra*, which again is a pleading case.

The Supreme Court then states:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Pub. Co. v. U.S.*, 345 U.S. 594, 614 (1953), and meet the requirement that petitioner has thereby suffered

[32]**Radovich v. National Football League**, 1957, 352 U.S. 445, 453.

injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public 10/ and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public."[33]

The Supreme Court, by Note 10 and reference to its earlier decision in *Apex*, defines what it means by "prohibited activities injurious to the public" and what the "forbidden practices" are from which the public is to be protected. Note 10 reads as follows:

"In *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of the purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury*,' (Emphasis supplied.) Id., at 493."[34]

To further emphasize the restriction to free competition to which it referred, the Supreme Court continued its Note 10 as follows:

"In *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912), speaking of the antitrust laws the Court said: '*The law is its own measure of right and wrong*, of what it permits, or forbids, and *the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.' (Emphasis supplied.) Id., at 49."[35]

We take it that by this Note the Supreme Court admonishes the inferior courts not to come to their own philosophical conclusions as to what restraints of trade should be prohibited, con-

[33]Ibid. 454.

[34]It is to be noted that the emphasis supplied in the foregoing quotation by the Supreme Court of its earlier decisions in **Apex**, was supplied by that Court, not by this Court.

[35]The three-judge dissent in **Radovich** is of no materiality here, because it is based upon the appropriate compulsions of **stare decisis**, and the binding effect of the **Toolson** case.

trary to the language of a statute which was constituted and adopted with recognition of the existing rules of common law. We cannot say what we may think it should be because of personal antitrust philosophy or predilection.

Times-Picayune Pub. Co. v. United States, 1953, 345 U.S. 594, is cited in *Radovich,* 352 U.S. at 453, as setting up the tests by which any wholly non-frivolous claim of a plaintiff is to be tested.

In *Times-Picayune* the District Court had denied the government's motion for summary judgment which had urged that "the unit contracts" therein under attack were per se violations of §1 of the Sherman Act. But after trial the District Court found that the defendants had instituted the unit contract system "in order to 'restrain general and classified advertisers from making an untrammeled choice'" between two competing papers "'in purchasing advertising space, and also to substantially diminish the competitive vigor of'" the opposing paper, and that this unit system was "economically enforceable against (advertising) buyers solely because of the Times-Picayune's 'dominant' or 'monopoly position.'"[36]

The Supreme Court, reviewing these findings, then related how the District Court had held §1 of the Sherman Act violated; that "tying arrangements" depended upon the market setting; and, that in the market setting found by the Supreme Court, "we do not think that the Times-Picayune occupied a 'dominant' position in the newspaper advertising market in New Orleans."[37] It was therefore necessary for the Supreme Court to test the advertising contracts under attack

> ". . . under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of §1, '[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se.' *United States v. Columbia Steel Co.,* 334 U.S. 495, 522 (1948). Since the

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[36]**Times-Picayune v. United States,** 1953, 345 U.S. 594, 601.

[37]*Id.* at 611.

requisite intent is inferred whenever unlawful effects are found, *United States v. Griffith*, 334 U.S. 100, 105, 108 (1948); *United States v. Patten*, 226 U.S. 525, 543 (1913), and the rule of *International Salt* is out of the way, the contracts may yet be banned by §1 if unreasonable restraint was either their object or effect. . . . For our inquiry to determine reasonableness under §1 must focus on 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.' 334 U.S., at 527; compare *Standard Oil Co. of California v. United States*, 337 U.S. 293, 312-313 (1949)."[38]

Mr. Justice Clark then treats the factual situation disclosed by the evidence, finds the advertising contracts were the results of endeavors to "rationalize" operations; were legitimate business aims; were not conceived to achieve monopolistic ends; were at least partially induced by competitive business considerations and "did not bespeak a purposive quest for monopoly or restraint of trade."[39]

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[38]Id. at 614-615.

[39]Id. at 623.

"Consequently, no Sherman Act violation has occurred unless the Publishing Company's refusal to sell advertising space except en bloc, viewed alone, constitutes a violation of the Act. Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of §1, **Kiefer-Stewart Co. v. Seagram & Sons**, 340 U.S. 211, 214 (1951); **Associated Press v. United States**, 326 U.S. 1 (1945); see **United States v. Columbia Steel Co.**, 334 U.S. 495, 522 (1948), different criteria have long applied to qualify the rights of an individual seller. Beginning with **United States v. Colgate & Co.**, 250 U.S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though 'neither absolute nor exempt from regulation.' **Lorain Journal v. United States**, 342 U.S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. **Lorain Journal v. United States, supra**; **United States v. Bausch & Lomb Optical Co.**, 321 U.S. 708, 721-723 (1944); **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U.S. 359, 375 (1927); **United States v. Schrader's Son, Inc.**, 252 U.S. 85, 99 (1920); cf. **American Tobacco Co. v. United States**, 328 U.S. 781, 808 (1946); **Federal Trade Commission v. Beech-Nut Packing Co.**,

This case, to us, holds that "restraints of trade," as that language is used in the Sherman Act means "unreasonable" restraints of trade, and "unreasonable restraints of trade" are (1) illegal per se restraints interfering with free competition in business and commercial transactions which tend to (a) restrict production; (b) affect prices; or, (c) otherwise control the market to the detriment of the purchasers or consumers of goods and services, or (2) those restraints of trade, ordinarily reasonable, but made unreasonable because accompanied with a specific intent to accomplish the equivalent of a forbidden restraint.

Applying these tests to the instant facts we must ask:

(1) What is *the restraint* relied upon?

(2) Is the restraint *illegal per se*?

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257 U.S. 441, 453-455 (1922). Still, although much hedged about by later cases, **Colgate's** principle protects the Times-Picayune Publishing Company's simple refusal to sell advertising space in the Times-Picayune or States separately unless other factors destroy the limited dispensation which that case confers.

In our view, however, no additional circumstances bring this case within §1. . . . With the advertising contracts in this proceeding viewed as in themselves lawful and no further elements of combinations apparent in the case, §2 criteria must become dispositive here.

An insufficient showing of specific intent vitiates this part of the Government's case. While the completed offense of monopolization under §2 demands only a general intent to do the act, 'for no monopolist monopolizes unconscious of what he is doing,' a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged. **United States v. Aluminum Co. of America,** 148 F.2d 416, 431-432 (1945); **United States v. Griffith,** 334 U.S. 100, 105 (1948); **American Tobacco Co. v. United States,** 328 U.S. 781, 814 (1946); **Swift & Co. v. United States,** 196 U.S. 375, 396 (1905). This case does not demonstrate an attempt by a monopolist established in one area to nose into a second market, so that past monopolistic success both enhances the probability of future harm and supplies a motivation for further forays. **Cf. United States v. Griffth, supra; Swift & Co. v. United States, supra. And unlike Lorain Journal v. United States,** 342 U.S. 143 (1951), where a single newspaper's refusal to sell space to advertisers unless they forewent advertising over a competing local radio station manifested 'bold, relentless, and predatory commercial behavior,' **id.,** at 149, no remotely comparable charge is borne out here. • • •

We conclude, therefore, that this record does not establish the charged violations of §1 and §2 of the Sherman Act." **Id.** at 624-627.

(3) If not, *(i.e.,* if an otherwise reasonable restraint) is it accompanied with *a specific intent to accomplish a forbidden restraint?*

(4) Was the *object* of the contract or combination under attack an *unreasonable restraint?*

(5) Was the *effect* of the contract under dispute an *unreasonable restraint?*

Times-Picayune further suggests, that in determining what constitutes an *"unreasonable restraint"* (either sought by or resulting from defendants' acts), we must determine (a) the percentage of business controlled; (b) the strength of the remaining competition; (c) whether the action criticized was the result of business requirements or done with a purpose to monopolize.

Here the restraint relied on; as we see from the complaint,[40] was in preventing plaintiff from obtaining *certain* electrical appliances for resale, while at the same time permitting Broadway-Hale to purchase those *certain* electrical appliances. This is a simple refusal to sell, allegedly by joint action. Various other competing electrical appliances were shown by the record before the trial court to be available to Klor's, Inc.[41] Many other retailers sold these "certain electrical appliances" to the public, fifty-three in the Mission District of San Francisco alone. The number of retailers in San Francisco from the start of the alleged conspiracy to the time of filing suit increased.

There was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly. It is not suggested that either the object or effect of the alleged conspiracy was to create an unreasonable restraint, illegal per se.

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[40]Tr. p. 8, para. III.

[41]Twenty competing brands of television sets compared to the seven declared impossible to attain; eighteen competing brands of refrigerators, compared to three; twenty-three stoves, compared to five; thirty competing clothes washers and dryers, compared to two. See Statement of Facts, **supra.**

If a business transaction and the effect and object of such transaction between two or more persons is lawful, then the transaction cannot be nor can it create an unlawful conspiracy. If "X Company," a manufacturer, refuses to sell to Klor's, Inc., and sells to "Y Company", a retailer who also agrees to buy from "X" as long as "X" does not sell to Klors, more than one person is involved, and they have agreed not to sell, but their act is not necessarily[41a] illegal. To a minute degree, any refusal to sell is a restraint of trade, in the ordinary sense; but it is not necessarily a restraint in the Sherman Act sense. Some restraints of trade are reasonable, and hence not violative. Others are not in, nor do they affect, interstate commerce, and hence are not violative. Others are so remote in their effect on the public at large as not to be restraints for Sherman Act purposes. *Apex Hosiery v. Leader, supra; Eastern States Lumber Dealers Association v. United States*, 1914, 234 U.S. 600; *Miller Motors v. Ford Motor Co.*, 4 Cir., Jan. 20, 1958, ... F.2d ....., affirming, 149 F.Supp. 790 (1957); *Hudson Sales Corp. v. Waldrip*, 5 Cir., 1954, 211 F.2d 268; *Fedderson Motors v. Ward, supra; Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 2 Cir., 1943, 136 F.2d 844.

The purpose of the antitrust statutes is to protect the "public" from the harm which follows from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort and which conduct can be described as an undue restraint of trade.[42] Notwithstanding the many phrases which may be picked at random out of numerous cases, and, out of context, be made to support the position that concerted conduct directed at harming the opportunity of a single trader to compete is always within the prohibitions of the Sherman Act, it is our opinion that there exists the

[41a] See the "simple example" suggested by Mr. Justice Black in **Northern Pacific Railway Co. v. United States, supra,** at 653:

> "[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

[42] **Wilder Mfg. Co. v. Corn Products Refining Co.**, 1915, 236 U.S. 165, 174; **Eastern States Lumber Dealers Ass'n v. United States**, 1913, 234 U.S. 600.

need to show facts in a motion such as this from which a court might reasonably infer "public injury" before an antitrust violation is before the court; and, further, that the Supreme Court has not departed one whit from this requirement.

Where the particular conduct in restraint of trade is of the kind prohibited by the Act and where the inference of public injury reasonably can be extracted from the complaint, a good cause of action is stated. Assuming these conditions are met, a private plaintiff has the right to bring an action for treble damages for injury to his business or property "by reason of anything forbidden in the antitrust laws (Title 15, U.S.C. §15) and for an injunction." (Title 15, U.S.C. §26.) However, the private right is not a remedy for a private wrong created by federal law. The private right is a method of enforcing public rights and thereby providing additional means of enforcing the prohibitions of the statute. "Congress . . . has provided sanctions allowing private enforcement of antitrust laws by an aggrieved party." *(Radovich v. National Football League, supra* at 454.) In this way it is entirely accurate to assert that "these laws protect the victim of the forbidden practice as well as the public." *(Ibid.)* But the private right is a purely incidental means of enforcing the Act. Before there can be any "forbidden practices" there must be an improper restraint of trade or commerce; once this is established or reasonably put in issue, the private right and the consequent private protection arise. Without the prohibited restraint, there is no private right for there has been no violation, i.e., there has been no conduct of defendants, which is or conceivably could be injurious to the public welfare. Plaintiff must allege (and here prove) that there has been a prohibited restraint and that he has been proximately damaged thereby in order to sustain his complaint or position against a motion to dismiss or for summary judgment. He need not allege, additionally, that the public has been injured by defendants' conduct. But to have the prohibited restraint there must be facts from which it can be determined that the "conduct charged . . . was reasonably calculated to prejudice the public interest by unduly restricting the free flow of commerce." *(Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5 Cir., 1954, 214 F.2d 891.) The Supreme Court in *Radovich*, relied on so heavily by plaintiff, said no more than this in quoting

Justice Holmes' conclusion in *Hart v. B. F. Keith Vaudeville Exchange*, 1923, 262 U.S. 271, 274:

> "It is enough (for purposes of motion to dismiss) that we are not prepared to say that nothing can be extracted from this bill that falls under the Act of Congress, or at least that the claim is wholly frivolous."

Turning now to the cases cited to us by plaintiff, we are unable to discern any deviation from what we have just stated. Plaintiff asserts that the case of *Shotkin v. General Electric Co.*, 10 Cir., 1948, 171 F.2d 236, established a new requirement for private antitrust litigation: that plaintiff is required to allege injury to the public in order to state a cause of action. We are unable to find any such requirement in *Shotkin*. In affirming the granting of a motion to dismiss, Judge Bratton, speaking for the Court, said:

> "Founded upon these broad concepts of public policy, the Act is limited in operative scope and effect to combinations, agreements, or concerts which tend to prejudice the public interest by unduly restricting competition or unduly obstructing the due course of trade, or which because of their evident purpose or inherent nature injuriously restrain trade in the competitive markets.
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> • • •
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> It is essential to recovery in an action of this kind that plaintiff allege and prove two things: a violation of the Act, and damages to plaintiff proximately resulting from the acts and conduct of the defendants which constitute the violation of the Act. Injury to the plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as a result of the wrongful contract, combination, or concert.
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> • • •
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> In other words the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into which brought about an increase in prices to the consuming public, a diminution

in the volume of merchandise in the competitive markets, a deterioration in the quality of merchandise available in the channels of commerce, or other like evil consequence in the free flow of interstate commerce."[43]

We are unable to discern any new doctrine in the above extract. It seems to be no more than a concise and accurate statement of well-established requirements for private recovery under the antitrust provisions.

It is true that on a motion for dismissal the complaint is to be broadly interpreted in a manner most favorable to the pleader;[44] but that does not mean that the court must find allegations of ultimate facts in conclusionary pleading, or a violation of the Sherman Act from allegations of action directed solely at plaintiff and which, as such, could have as a matter of law no conceivable effect on the competitive market.

Similarly with *Fedderson Motors v. Ward, supra*, which plaintiff argues continued the "new requirement" of public injury supposedly injected by *Shotkin. Fedderson* also is a case where, on affirming a judgment dismissing the complaint, the court was unable to find any allegation of material fact evidencing an antitrust violation.

The Supreme Court in *Radovich v. National Football League, supra*, termed controlling of this case by plaintiff, did not, in our opinion, in any way overrule these cases. The Court in *Radovich* did no more than to re-assert Justice Holmes' admonition that the test of sufficiency of the complaint is whether "the claim is wholly frivolous." *(Id.* at 453.) In reversing this Court the Supreme Court determined that the allegation of defendants' attempt to eliminate from competition the All-America Conference, defendants' *only* competitor in professional football, which thereby caused injury to the plaintiff in his business or property, was sufficient to sustain the complaint against a motion to dismiss for failure to state a cause of action under the antitrust laws. Read

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[43]171 F.2d, at 238-239.

[44]**Radovich v. National Football League, supra; William Goldman Theatres, Inc. v. Twentieth Century Fox,** E.D.Pa., 1957, 151 F.Supp. 840.

thus, the *Radovich* case is entirely consistent with *Shotkin, Fedderson,* and all other cases in which the Supreme Court and the lower federal courts have adhered to the requirement that a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured.[45]

Plaintiff cites us many cases involving group boycotts, discrimination, and the use of large scale buying power to drive out a competitor. And he supplies us with many quotations which at first blush appear to support his position. But each of his authorities involves factual situations entirely different from the one before us; factual situations in which the random phrases picked by plaintiff are proper and not inaccurate; they do not, however, support the contentions made here.

We are told that the antitrust laws are a trader's statute and cited to *Mandeville Farms v. Sugar Co.,* 1948, 334 U.S. 219; but that case holds that the antitrust statute "does not confine its protection to purchasers, to competitors or to sellers." *(Id.* at 236.). The statute, so *Mandeville Farms* decides, includes protection against the anti-competitive conduct of *buyers* also. But the reason for such protection, is as always, fear of the detrimental effect on the public which these practices may have. In holding that concerted action by processors directed against growers is barred by the antitrust laws, the Court did not intend such a phrase as protection of "all who are made victims of the forbidden practices" *(Id.* at 236) to be used to create a cause of action for a single competitor injured by action directed solely at him which has no substantial effect on competition. Where there is no conceivable way in which a substantial segment of the public can be injured by the conduct attached, the Sherman Act is not violated. *(Apex Hosiery v. Leader, supra.)* The *Mandeville Farms* case is in no way contrary. It is not authority for the proposition that conduct directed solely and exclusively at an individual competitor is illegal, unless the result is a substantial lessening of competition in the particular market involved.[46]

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[45]See **Mandeville Farms v. Sugar Co.,** 1948, 334 U.S. 219; **Apex Hosiery v. Leader, supra,** Report of the Attorney General's National Committee to Study the Antitrust Laws 12 (1955).

[46]See **International Salt Co. v. United States,** 1947, 332 U.S. 392, 396.

In each of the "Theatre" cases relied on by plaintiff, defendants' conduct either did or was intended to eliminate the sole competitor in a particular market, was directed at one of a very small number of competitors,[47] or involved the use of large scale monopolistic power derived from nationwide enterprises to eliminate a competitor and thereby substantially affect competition in the local market area. (See, *e.g., United States v. Schine Chain Theatres,* 1948, 334 U.S. 110; *United States v. Griffith,* 1948, 334 U.S. 100; *Bigelow v. RKO Radio Pictures,* 1946, 327 U.S. 251; *Binderup v. Pathe Exchange,* 1923, 263 U.S. 291; *Hart v. B. F. Keith Vaudeville Exchange, supra; Paramount Film Distributing Corp. v. Village Theatre,* 10 Cir., 1955, 228 F.2d 271; *William Goldman Theatres v. Loew's, Inc.,* 3 Cir., 1945, 150 F.2d 738; *White Bear Theatre Corp. v. State Theatre Corp.,* 8 Cir., 1942, 129 F.2d 600; *Victor Talking Machine v. Kemeny,* 3 Cir., 1921, 271 F. 810.

Finally to be considered are those cases cited to us in which price fixing or some other form of complete market control was involved and where defendants' conduct was directed at a particular class of persons of which plaintiff was one. Here again it is clear that control or attempted control of all competitors is the evil which causes the contracts, combinations, or conspiracies to be the type prohibited by §1 of the statute. These cases are not here applicable; the conduct involved either was intended to control the entire market and was directed at plaintiff because he refused to conform or was directed at an entire class of defendants' competitors, buyers, or sellers, one of whom was the plaintiff. (See, *e.g., Radovich v. National Football League, supra; Kiefer-Steward v. Seagram & Sons,* 1951, 340 U.S. 211; *International Salt Co. v. United States,* 1947, 332 U.S. 392; *Fashion Guild v. FTC,* 1941, 312 U.S. 457; *Flintkote v. Lysfjord,* 9 Cir., 1957, 246 F.2d 368; *United States v. Tarpon Springs Sponge Exchange,* 5 Cir., 1944, 142 F.2d 125; *Package Closure Corp. v. Sealright Co.,* 2 Cir., 1944, 141 F.2d 972; *Roseland v. Phister,* 7 Cir., 1942, 125 F.2d 417; *Johnson v. J. H. Yost Lumber Co.,* 8 Cir., 1941, 117 F.2d 53.) Not one of the out of context quota-

[47]Removal of any one competitor thereby having a substantial effect on competition.

tions from the foregoing cases used by plaintiff will support his position when read within its factual setting.

Count one of the complaint, with which we are here solely concerned, alleges, in paragraph six, that defendant Broadway-Hale, in combination with each of the manufacturing-distributing defendants, prevented *plaintiff* from obtaining products to sell to the public. There is no allegation of actual, attempted, or intended control of the market in which plaintiff and defendant Broadway-Hale competed, considering the market to be either the retail sellers of the Mission District of San Francisco, the city itself, or the purchasing public. Defendants' affidavits, submitted under the provisions of Rule 56 of the Federal Rules, as well as the facts of which this Court may take judicial notice leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under the circumstances any substantial effect on market competition. As defendants point out there are literally hundreds of dealers in the San Francisco Bay Area dealing in the same kinds and brands of major appliances as plaintiff and defendant Broadway-Hale. On Mission Street, along with the plaintiff and Broadway-Hale, there are over forty retail dealers. Additionally, there are numerous brands of appliances to which plaintiff was not denied access and which compete favorably with those he was denied.[48] In light of our previous discussion, such allegations, especially when considered on motion for summary judgment rather than on motion for dismissal of the complaint, do not allege facts from which it can be inferred that there was or may be a substantial effect on competition, and therefore do not allege a violation of §1 of the antitrust laws—they do not state facts from which injury to the public can be perceived.

The first sentence of paragraph six of count one of plaintiff's complaint is of no assistance to appellant. It alleges only that "defendants . . . have restrained trade and commerce . . . by contracting, combining, and conspiring together . . . in restraint and monopoly of such trade and commerce . . . and have thereby substantially lessened, limited and restrained competition in said

[48]See the Supreme Court's discussion of the effect of competing alternatives on alleged antitrust violations in **Times-Picayune v. United States, supra.**

trade and commerce. . . ." This is no more than the pleader's conclusion that defendants have restrained trade and commerce by restraining trade and commerce. It states no facts from which illegal action can be perceived or inferred. Paragraph eight of count one speaks of Broadway-Hale's "monopolistic buying power" enjoyed "by reason of the large number of retail outlets it operates." But the essence of this allegation is that Broadway-Hale "has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff." We find no basis for determining that Broadway-Hale intended, or had the power if it so intended, to effect such conditions on its purchases in such scope as to appreciably affect competition among retailers generally in their purchases or sales to the public. It is well known that appliance sales are within a most highly competitive market. As between two dealers, one may be able to condition his purchases by requiring no sales to the other. So long as the ability to so condition one's own purchases does not substantially interfere with either the "retailing public" or the "consuming public," there is no conduct which violates the provisions of the antitrust laws.

In determining whether certain conduct was "in restraint of trade or commerce," we re-emphasize what was said by the Court in *Apex Hosiery v. Leader, supra,* at 493, 500:

> "The end sought (by the Sherman Act) was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or *otherwise* control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. • • •
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> . . . [R]estraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is (sic) not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." [Emphasis added.]

In other words, restraints, in order to be violative of the law, must operate, or be intended to operate, to restrict commercial competition in a *substantial* manner.

We believe this to be an accurate and controlling statement of the law applicable in determining whether particular conduct conceded to exist does or does not constitute a violation of the antitrust laws. Neither *Shotkin v. General Electric Co., supra,* and *Fedderson Motors v. Ward, supra,* nor the cases which follow and rely on them are to the contrary; nor does *Radovich v. National Football League, supra,* weaken or limit the conclusions derived from the *Apex* case.

We hold, therefore, that plaintiff's first cause of action, as proved, is fatally defective. The facts prove no more than a squabble between two of many competitors in a highly competitive market area. The facts prove no conduct in violation of the antitrust laws because there has been no conduct by which the "public" could conceivably suffer injury. Construing the complaint and affidavits together, and considering the facts judicially known to this Court and the court below, the motion for summary judgment was properly granted.

The judgment is *affirmed.*

(Endorsed:) Opinion. Filed. Mar. 28, 1958.

Paul P. O'Brien, Clerk.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,380

Klor's, Inc.,
Appellant,

vs.

Broadway-Hale Stores, Inc., et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered: March 28, 1958.
Paul P. O'Brien, Clerk.

Appendix C

Sherman Act, Section 1, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, 15 U. S. Code, Sec. 1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

Section 2, Sherman Act, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, 15 U.S. Code, Sec. 2:

"Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U. S. Code, Sec. 15:

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Rules of Civil Procedure, Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavit; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present

by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.